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Jurisprudence: Readings and Cases

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BOOK REVIEW

JURISPRUDENCE: READINGS AND CASES

by *Mark R. MacGuigan*

University of Toronto Press,
Toronto, Ontario, Canada, 1966. Pp. 666. \$20.00

Reviewed by

DR. MIRIAM THERESA ROONEY *

This is a worthwhile book. It is organized in less than 700 pages, and is therefore compact enough for basic classroom use. Within such a limited space it is amazingly comprehensive. Furthermore, it concentrates upon the problems of Jurisprudence of the 1960's, without omitting indications of the more important historical antecedents.

All the materials, which are highly relevant, are skillfully edited, and arranged in a sequential order of cogency upon points currently at issue. They are divided into four principal chapters: 1) Positivism; 2) Natural Law Thought; 3) Sociological Jurisprudence; and 4) Judicial Process. An Introduction, and

an Appendix, reviewing the present trends and prospects for Jurisprudence in Canada, where Common Law and Civil Law co-exist under one Constitution, complete the presentation.

Although the compiler includes extensive excerpts from many of the books which have become classics in Anglo-American juridical thought, and consistently presents them in a respectful and judicious manner, which ensures the usefulness of the book no matter what viewpoint the reader prefers, he nevertheless does not fail to take a strong realist position of his own in the comments interspersed throughout. Indeed the critiques and contributions he makes in this way, in addition to his skillful choice of representative expositions of influential arguments, are sufficient to accredit him as

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a creative author, rather than as a mere compiler. His work therefore constitutes an important event in this difficult branch of contemporary thought.

One of the curious phenomena of the universities in the common-law world, noted by the compiler, who is competent in both fields, is the divergent directions manifest between philosophy departments and law school teaching. In Canada, for example, Scottish idealism still dominates the Philosophy courses offered, while Jurisprudence is hurrying to catch up with advances in Economics and Psychology. However, neither appears to be concerned with the realism that the Papal Encyclicals refer to as "the new Jurisprudence." Of course, confusion, and not clarification of aspirations, is the result.

Notwithstanding the notorious lag in law and in legal theory which befogs the advancement of the juridical order toward meeting needs, a review of the teaching materials that have appeared in the twentieth century discloses a definite shift from the static to the dynamic. Especially after World War I, and again after World War II, reported decisions, no less than books and articles, have stressed facts rather than precedents, thereby opening the way for law to incorporate some of the features of the scientific revolution.

Sociological Jurisprudence has been widely welcomed as a replacement for the hitherto prevailing positivism. A re-examination of the judicial process, in preference to substantive law only, has been looked upon hopefully, as presenting a means for reducing the lag. However, experimentation in that direction has not proved adequate. Consequently, there appears to be less op-

position today to a revival of the so-called natural law than was the situation in the 1920's and '30's when the new restiveness set in. The need for a scale of values or priorities in measuring the effectiveness of the judicial process has raised anew the question of the relation of law to morals, while the insistence on facts, and ever more facts, has required the sort of reconciliation between facts and values which realism offers. Whether one rereads Hobbes, Bentham and Austin, or Hume, Kant and Hegel, the conviction grows that their works are definitely dated, with little to say to an age of increasing personal responsibility for more just law and government.

As a teaching tool, designed to challenge the thinking of students who are likely to be practicing law in the twenty-first century, this book is to be highly recommended. The history of collected readings, and of cases, of jurisprudential significance is itself of recent origin. Beginning with Jerome Hall's *Readings in Jurisprudence* (Bobbs-Merrill) in 1937, the convenience of having various quotations within one cover for class reference has proved increasingly attractive. Especially desirable has been this means of introducing the neophyte to the style of influential writers as presented in their own words, instead of by hearsay evidence. Earlier there had been little other than Roscoe Pound's bibliographical guides to expand the student's horizon beyond the traditional didactic method, limiting the required text to a single viewpoint in wrestling with many-sided problems.

Although treatise writers in the common-law system have never attained the authoritative position among the rec-

ognized sources of law that they have with the civilians, the course in Jurisprudence has frequently devoted much more attention to treatise writers and theorists than to judicial opinions as reported in the cases. Yet it is the jurisprudence implicit or explicit in the reports which authoritatively shifts the direction of the law. The real problem for the teacher of jurisprudence—unfortunately not always recognized—is how best to prepare students to pick out the jurisprudential tendencies latent in the reasoning of the judges. For this skill not merely a few illustrative cases were needed, but a well organized casebook, comparable in form and content to the casebooks which have become familiar in substantive law courses since Langdell's day, back in 1870.

Although some judicial opinions were quoted in the books of readings from 1937 onwards, it was not until 1958, with the publication of the pioneer casebook presented by Dr. John C. H. Wu (West Publishing Co.) that the needed emphasis on the opinions of the judges, whether *ratio decidendi* or *obiter dictum*, was introduced among the pedagogical tools available for student training in the analysis and synthesis of juridical foundations. It is upon the novel experimentation of such compilers of readings, and cases, as Jerome Hall, Lon Fuller (*Problems in Jurisprudence*, Foundation Press), and John C. H. Wu, that Dr. MacGuigan has built his own structure.

This has been designed primarily to assist present and future law students in Canada to grasp the significance of modern jurisprudential developments, but is well suited to bring before American,

British, Irish, and Australian students, no less than those of Upper Canada and Quebec, the latest writings. It may also serve comparative law purposes. Indeed, if the Italians, Germans, French, Russians, Spanish, and Japanese want to have the perplexing Anglo-American views systematically presented in a single volume, this is the book to meet their need.

For the professor of Jurisprudence who must introduce the subject to law school seniors through a broad survey of men and ideas, and touch upon the high points, at least, in the progress of juridical thought, notwithstanding the time limitations put upon a course in which no bar examiner nor bread and butter client is likely to raise a specific question, a course book which will save wear and tear on the library staff and yet give a comprehensive guide to the most flavorful writers, has been much needed. So many names, through so many centuries, must be mentioned that a confusing eclecticism can result. Since there has been practically no agreement upon materials, problems, or methods in teaching the course, each teacher is called upon to improvise. The experience of one professor (this reviewer) has been that a biographical presentation is preferable to a topical arrangement. A list of jurists to be discussed having been announced, students are asked to select from the list at least one name, to ascertain pertinent biographical data in context, then read, summarize, and evaluate the more important writings of the jurist chosen, and present an oral report for about a half hour, subject to questions and comment from the class. The professor sup-

plements or clarifies statements made in the oral report. Active class participation is encouraged by announcing that the final examination in the course will involve detailed knowledge of the writers discussed, and that acquisition of the necessary knowledge may come from consultation with the class expert who has prepared the report, or from personal library research, or both. The final examination, in fact, includes case situations, hypothetical or actual, mentioned during the course, followed by the usual query: what decision; why?, with special attention being given in grading to the reasoning submitted. At intervals the professor is able to correlate the different authors reported upon and to relate their achievements to contemporary developments and trends. In this way the course is kept flexible and up to date, and the students obtain new perspectives in their appraisal of the substantive law courses.

When surveying each new book on Jurisprudence that appears, it is interesting to note how many authors chosen for biographical presentation in class have also been featured in the latest book.

Usually differences in emphasis occur, which is to be expected because of the lack of consensus generally about the course. With this book an astonishing amount of agreement is found. Even excerpts from Thomas Aquinas, and from the Encyclical, *Pacem in Terris* (which, together with the other three major social Encyclical Letters of the modern Popes, are regularly assigned for term papers in the midst of the biographically oriented course) are made available within the covers of the MacGuigan book.

Furthermore, attention is no longer confined to judicial opinions primarily, but is expanded to include some legislative references. This is itself an innovation in the study of Jurisprudence, and indicates, along with the inclusion of very recent articles and books, how up to date the compilation is. Professors and students will welcome the challenges to be found here. Also busy practitioners, anxious to catch up on trends and tendencies in contemporary law, will find this an excellent purchase. Even though the price may appear discouraging at first glance, there is a lot of value here.





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